IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.528 OF 2003

Shri Pandurang Tatoba Deshmukh ...Appellant

Versus

Dnyanu Sakhoba Nangare (Khot)
(Deceased) through Heirs:
Vasant Dnyanu Khot & Ors. ...Respondents

WITH
CIVIL APPLICATION NO.900 OF 2007

Shri Pandurang Tatoba Deshmukh ...Applicant

Versus

Dnyanu Sakhoba Nangare (Khot)
(Deceased) through Heirs:
Vasant Dnyanu Khot & Ors. ...Respondents

Shri A.A.Kumbhakoni i/by Shri A.M.Kulkarni for the Appellant/Applicant.

Shri P.D.Dalvi for the Respondents.

CORAM : ABHAY S.OKA, J.
DATED : JULY 23, 2007.

P.C.:

1. This Second Appeal is preferred by the unsuccessful Plaintiff. After the submissions on merits of the Appeal were substantially heard on the last date, the learned counsel appearing for the Appellant sought time to file an Application to grant leave to withdraw the original suit with permission to file a fresh suit in respect of the present dispute over the suit property between the same parties after impleading the concerned

Gram Panchayat as a party. Accordingly Civil Application No.900 of 2007 is filed. I have heard the learned counsel appearing for the parties on the said Application. I have also heard further submissions on the merits of the Second Appeal.

2. The Appellant is the original Plaintiff. The suit filed by the Appellant-Plaintif is simplicitor for injunction restraining the Respondents from interfering with the alleged possession of the Appellant over the suit property which is more particularly described in paragraph No.1 of the plaint. The suit property is Plot No.91. According to the Appellant-Plaintiff, the State Government had acquired various lands which were allotted to the Village Panchayat of Farnewadi (Shigaon) for the purposes of extension of gaothan. According to the case of the Plaintiff, the Village Panchayat prepared a layout plan of the lands which were acquired by the State Government and the said layout was approved by the Tahsildar. It is alleged that the Village Panchayat allotted the suit property on 19th October, 1979 to the Plaintiff. The suit is filed as the Respondents tried to interfere with the alleged possession of the Appellant-Plaintiff over the suit property.

3. The suit was contested by the Respondents. The Respondents denied possession and title of the Plaintiff. According to the Respondents, the alleged possession receipt executed by Village Panchayat in favour of the Plaintiff on 19th October, 1979 was illegal. It is contended that no resolution was passed by the Village Panchayat for allotment of the suit property in favour of the Plaintiff. It is contended that the acquired lands bearing Gat No.77 belonging to the family of the Defendants is situated in the the village Dhavali and therefore, the suit plot which is a part of the Gat No.77 cannot be a part of village Farnewadi. It is contended that the Village Panchayat was a necessary and proper party to the suit. It is alleged that the Village Panchayat had no authority to deal with the land acquired by the State Government without previous permission of the Chief Executive Officer of the Zilla Parishad.

4. Various issues were framed by the trial Court. One of the issue was as regards non-joinder of a necessary party. The trial Court held that the Plaintiff-Appellant has failed to establish the title. In so far as issue of non-joinder of necessary parties is concerned, trial Court accepted the contention raised by the Respondent-Defendant and held that the Village

Panchayat was a necessary and proper party. The Appeal preferred by the Appellant has been dismissed.

5. The Appellate Court held that the Village Panchayat had not obtained prior permission of the Competent Authority before purporting to transfer the suit plot in favour of the Appellant. The Plaintiff had relied upon possession receipt dated 05th October, 1974 by which possession of the land bearing Gat No.77 was allegedly transferred to the Village Panchayat. The Appellate Court held that the said possession receipt was not admissible in evidence as the original was not produced and what was produced was a copy of the alleged original receipt.

6. The learned counsel appearing for the Plaintiff has brought to my notice the fact that the Courts below have referred to order dated 09th November, 1984 passed by the Sub-Divisional Officer by which the allotment of the suit property by the Village Panchayat in favour of the Appellant was set aside. It is provided in the said order that after the Civil Court decides the matter finally, necessary order will be passed by the Sub-Divisional Officer.

7. Civil Application No.900 of 2007 is filed for

seeking leave of this Court to withdraw the original suit with liberty to file a fresh suit in the subject matter of the suit. It is contended that the suit may fail as a result of a formal defect, namely, the failure to implead the Village Panchayat as a party. It is stated that as of today the name of the Appellant appears in assessment list maintained by the Village Panchayat. It is stated that on par with several other allottees, the Appellant has paid necessary amount to the Village Panchayat. It is submitted that the suit was likely to fail as a formal declaration of ownership was not claimed. In short, it was pointed out that as a formal declaration of ownership was not claimed and as Village Panchayat was not impleaded as a party, the suit was likely to fail by virtue of the formal defects. It is submitted that this Court has sufficient power under sub-rule 3 of rule 1 of Order XXIII of the Code of Civil Procedure, 1908 to permit withdrawal of the original suit with liberty as prayed.

8. The learned counsel appearing for the Respondent has placed reliance on a decision of Supreme Court in the case of **K.S.Bhoopathy & Ors Vs. Kokila & Ors [(2005) 5 Supreme Court Cases 458)**. In paragraph No.13 the Apex Court has held thus:

"This becomes all the more important in a case where the application under Order XXIII Rule 1 is filed by the plaintiff at the stage of appeal. Grant of leave in such a case would result in the unsuccessful plaintiff to avoid the decree or decrees against him and seek a fresh adjudication of the controversy on a clean slate. It may also result in the contesting defendant losing the advantage of adjudication of the dispute by the court or courts below. Grant of permission for withdrawal of a suit with leave to file afresh suit may also result in annulment of a right vested in the defendant or even a third party. The appellate/second appellate court should apply its mind to the case with a view to ensure strict compliance with the conditions prescribed in Order XXIII Rule 1(3) CPC for exercise of the discretionary power in permitting the withdrawal of the suit with leave to file a fresh suit on the same cause of action. Yet another reason in support of this view is that withdrawal of a suit at the appellate/second appellate stage results in wastage of public time of courts which is of considerable importance in the present time in view of large accumulation of cases in lower

courts and inordinate delay in disposal of the cases".

9. In the present case the Defendants had raised the plea of non-joinder of necessary parties at the earliest and even an issue is framed by the trial Court on the said aspect. The original suit is of the year 1981 which was decided in the year 1991. The suit was dismissed on the ground that a necessary and proper party was not impleaded. The Apex Court has held that the power under Order XXIII of Rule 1(3) of the said Code is discretionary. The power is sought to be invoked in the Second Appeal of the year 2003 for the first time in the year 2007. Considering what has been observed by the Apex Court, this is not a fit case for exercising the discretion under Order XXIII of Rule 1(3) of the Code at this stage in the Second Appeal. Hence, the Civil Application deserves to be rejected.

10. Turning to the merits of the Second Appeal, it is the case of the Appellant that the suit property is out of the Gat No.77 allegedly acquired by the State Government for extension of gaothan scheme. A finding of fact has been recorded by the Appellate Court that in so far as suit property is concerned, the Village Panchayat has not passed any resolution of allotment in

favour of the Appellant. Secondly, it is held that prior permission of the competent authority for transfer of the suit plots was not obtained by the Village Panchayat. The Appellate Court held that the possession receipt dated 05th October, 1974 was not proved as it was not the original possession receipt. The said possession receipt was allegedly the evidence of the fact that possession of Gat No.77 was handed over to Village Panchayat.

11. Reliance is placed in the Second Appeal on admissions allegedly given by the first witness examined by the Respondents. It must be stated here that the suit filed by the Appellant was on the basis of title as an allottee from the Village Panchayat. Once the Courts below came to the conclusion that there was no valid allotment in favour of the Appellant-Plaintiff, it is obvious that the Plaintiff was not entitled to discretionary relief of perpetual injunction. The allotment made in favour of the Appellant was purportedly set aside by order dated 09th November, 1984 passed by the Sub-Divisional Officer, Walva. Though the Sub-Divisional Officer has observed that final order will be issued by him after the decision of the Civil Court, it is always open for the Appellant, if permissible in law, to challenge the order dated 09th

November, 1984 and satisfy the concerned authority that the allotment made in his favour was legal and proper.

12. The impugned judgments and decrees deserve to be confirmed on the ground that prior permission of the concerned authority was not obtained by the Village Panchayat for allotment of plots and that Village Panchayat was a necessary and proper party to the suit. It must be stated here that the trial Court has held that the Appellant has failed to prove his exclusive possession referable to lawful title. No substantial question of law arises.

13. Hence, subject to what is observed earlier, the Second Appeal is dismissed with no orders as to costs.

14. Civil Application No.900 of 2007 is dismissed with no orders as to costs.

JUDGE